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No. 90-617

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

JAMES M. DOMBROSKI
Petitioner,

v.

F2 AMERICA, INC. and F2 INTERNATIONAL, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is this a case which turns on facts particular to petitioner or is this a case which presents issues of national importance.

PARTIES TO THE PROCEEDINGS

Respondents are F2 America, Inc., and F2 International, Inc. There are no parents, subsidiaries, or affiliates of the named parties that are not wholly owned, either directly or indirectly, by one or more of them.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents F2 America, Inc. and F2 International, Inc., respectfully request that this Court deny the Petition For Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is included in petitioner's Appendix (Pet. App. 1a-8a) and is reported at 902 F.2d 746 (9th Cir. 1990).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 636 (1988) provides in part:

(b)(1) Notwithstanding any provision of law to the contrary—

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an

indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

* * *

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure

to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

STATEMENT OF THE CASE

For purposes of this brief in opposition to the petition for writ of certiorari, the facts described in the Ninth Circuit's written opinion of this case reported at 902 F.2d 746 (9th Cir. 1990), (Pet. App. 1a-8a), are incorporated herein by reference.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner raises two issues in his argument. First, petitioner attacks the constitutionality of magistrates imposing sanctions under Federal Rule of Civil Procedure 11 as a nondispositive pretrial matter under 28 U.S.C. § 636(b)(1)(A) (1988). Secondly, petitioner claims statutory interpretation and review of magistrates' Rule 11 sanctions under 28 U.S.C. § 636(b)(1)(A)

(1988) has been inconsistent and has created conflicting results among the Circuit Courts.

It is respondents' position that the constitutionality of the Federal Magistrate Act has previously been upheld.[1] While the narrow issue of whether magistrates have jurisdiction to impose Rule 11 sanctions under 28 U.S.C. § 636(b)(1)(A) (1988) may not have been directly decided by this Court, it is clear from the plain meaning of the statute and prior court decisions that magistrates are indeed empowered to do so.

Moreover, the resolution of this issue is only important to the petitioner and not to the public as there is no actual conflict in the lower courts' application of the law, and there is no real conflict of opinion and authority between the circuits. In the alternative, even if the Court resolves a conflict between the Circuit Courts it would not change the outcome of the decision below as the present case is factually and legally distinguishable from the cases cited by the petitioner.

I

This Is a Unique Case With Facts Specific to Petitioner Who was Sanctioned for Filing a Frivolous Pleading Rather than a General Case With Issues of National Importance

In the underlying case, petitioner was sanctioned under Fed. R. Civ. P. 11, *sua sponte* by the magistrate, for filing a motion for reconsideration containing factual misrepresentations. The district court affirmed the magistrate's sanction order, and the Ninth Circuit in *Craig John Maisonville, and James M. Dombroski v. F2 America, Inc.; F2 International, Inc.*, 902 F.2d 746 (9th Cir. 1990) (Pet. App. 7a-8a), affirmed the District Court stating:

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[1] *United States v. Raddatz*, 447 U.S. 667 (1980) (constitutionality of § 636(b)(1)(B) affirmed); *Pacemaker Diagnostic Clinic of America Inc., v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) *en banc*, (constitutionality of § 636(c) affirmed) *cert. denied*, 469 U.S. 824 (1984).

> The crux of Dombroski's motion for reconsideration was that he was not given an adequate opportunity to be heard before the magistrate denied his motion for sanctions against the defendants. In this regard, there are two primary reasons why Dombroski's motion for reconsideration was factually frivolous. First, Dombroski's motion for reconsideration misstated the fact that he had no notice of a status conference which was originally called by the defendants regarding Dombroski's motion for discovery sanctions. This assertion was frivolous because Dombroski attempted to cancel the conference. In short, Dombroski obviously had notice of the conference or he would not have attempted to cancel it. Second, Dombroski's motion . . . maintained that the status conference was an improper ex parte hearing on his motion for sanctions against defendants. . . . This, too, was a frivolous assertion.

Clearly these facts represent a case unique to petitioner. There is no national issue relating to petitioner's failure to make a reasonable inquiry into the facts before he filed his motion for reconsideration, as mandated by Rule 11, for which he was sanctioned accordingly. The judicial officer merely sanctioned the attorney for misrepresenting facts before him. This case does not represent a general situation where attorneys are sanctioned for contempt or non-compliance with court orders.

II

The Federal Magistrate Act has been Determined to be Constitutional by this Court and the Circuit Courts

The Federal Magistrate Act of 1979, codified at 28 U.S.C. §§ 604, 631-636 (1988) and 18 U.S.C. §§ 3060, 3401-3402 (1988) and implemented by Fed. R. Civ. P. 72-75, allows district court judges to refer civil matters to federal magistrates, and allows magistrates to hear and determine any non-dispositive pretrial matter pending before the court, to make recommendations to the district court judge on dispositive matters, and with the consent of the litigants, to conduct a jury or non-jury trial and order final judgment.

The Act was amended in 1976, Pub. L. No. 94-577, 90 Stat. 2729, and again in 1979, Pub. L. No. 96-82, 93 Stat. 643, § 2(2), wherein Congress' objective was "to amend the current jurisdictional provisions for U.S. magistrates. . . in order to *further clarify and expand the jurisdiction of U.S. magistrates*". S. Rep. No. 74, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. Code Cong. & Admin. News 1469 (emphasis provided). The legislative history of the amendments indicates that it was intended that district courts should not be confined by the specifics of § 636(b)(1) and that magistrates may be employed in a wide variety of situations where such appointment is not inconsistent with the Constitution. *Foster v. Gloucester County Board of Chosen Freeholders*, 465 F. Supp. 293, 296 (D.C.N.J. 1978).

Petitioner's challenge to the statute is based on the implicit command of Article III that the judicial power of the United States be confined to judges under that Article, and that the attributes of Article III judges, permanency in compensation and tenure, are not provided to federal magistrates. This argument fails, however, because the delegation of authority to federal magistrates is controlled by the Article III judiciary. District court judges control the appointment, the tenure, the salary, and the docket of federal magistrates.[2] Judiciary control over the magistrates' docket provides the requisite element of judicial independence from the political branches required by Article III and thus preserves the constitutionality of the Magistrate Act.[3]

A. Federal Magistrates Have Jurisdiction To Impose Rule 11 Sanctions Under 28 U.S.C. § 636(b)(1)(A)

28 U.S.C. § 636(b)(1)(A) (1988) provides:

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[2] 28 U.S.C. §§ 633(b), 631(a), 634(a) (1988).

[3] For example, the district judge has discretion over the initial decision to refer a case to a magistrate. 28 U.S.C. §§ 636(b)(1)(A)-(B), 636(c) (1988); the district judge may withdraw the referral on his own motion for good cause or upon the motion of any party for cause, see *id.* at § 636(c)(6); and with consensual referrals under § 636(c), the parties can choose to have the district judge review the magistrate's judgment. See Note, *Federal Magistrates and The Principles of Article III*, 97 Harv. L. Rev. 1947 (1984).

> a judge may designate a magistrate to hear and determine any *pretrial matter pending before the court,* except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law. (emphasis provided).

The Court has made it abundantly clear that "[t]he starting point in statutory interpretation is 'the language [of the statute] itself.' " *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Absent the presence of special circumstances, such as where the terms of a statute are unambiguous, judicial inquiry is complete. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987).

Congress expressed specific exclusions from the magistrate's authority under § 636(b)(1)(A) and these exclusions did not include Rule 11 sanctions. If Congress wanted to prohibit magistrates from imposing sanctions made available under the law, such as sanctions under Rule 11 for filing frivolous pleadings, it would have listed such sanctions under the exclusions set forth in that section. Accordingly, the clear and unambiguous statutory language should be interpreted as *expression unius est exclusio alterius,* (expression of one thing is the exclusion of another), and no further interpretation of this language is needed.

Furthermore, magistrates are called upon to impose sanctions, as here for frivolous pleadings, as an auxiliary issue to determining pretrial matters. A "pretrial matter" under § 636(b)(1)(A) has been construed as "a matter unconnected to issues litigated at trial and not defined with respect to the time of the trial." *United States v. Flaherty*, 668 F.2d 566, 586 (1st Cir. 1981). Courts have held that one purpose of Rule 11 sanctions is to streamline the litigation process by discouraging the use of dilatory or abusive

tactics, such as filing of frivolous claims or defenses or the use of pleadings to harass or delay.[4] To deny magistrates the power to prohibit abusive tactics in pretrial matters by the imposition of sanctions would essentially undermine the purpose of Rule 11.

Petitioner argues that orders imposing Rule 11 sanctions are not pretrial matters because they do not involve a "'pretrial matter' relating to 'a claim or defense'." (Pet. 9). However, the language of § 636(b)(1)(A) does not require that the pretrial matters "relate to" a claim or defense. Petitioner appears to have paraphrased the language "relating to a claim or defense" from the standard of review given under Fed. R. Civ. P. 72(a) to magistrates' rulings on nondispositive matters. The statute does not contain this language and there is no requirement that a pretrial matter under § 636(b)(1)(A) or Fed. R. Civ. P. 72(a) must "relate to" a claim or defense. (*See, e.g., United States v. Flaherty, 668 F.2d at 586*).

Petitioner further argues that Rule 11 sanctions are related to contempt issues, and notes that magistrates are not empowered to try and punish contempts. Petitioner cites *Cooter & Gell v. Hartmarx Corp.*, ____ U.S. ____, 110 S. Ct. 2447 (1990) for the proposition that a Rule 11 motion, like a contempt proceeding, is a separate and independent proceeding at law. (Pet. 11). However, *Cooter* does not stand for the proposition that magistrates are denied contempt power because a contempt proceeding is an independent "proceeding". Nor does *Cooter* hold that a Rule 11 motion is the same as a contempt proceeding.

Furthermore, a Rule 11 violation is not conduct that constitutes contempt of authority. Contempt under § 636(e) is narrowly defined as constituting five specific types of conduct. When it appears that a party has committed an act defined as contempt under that section, the magistrate must certify the facts to a judge of the district court for review. Section 636(e) then provides for a different review procedure.

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[4] *Tarkowski v. County of Lake*, 775 F.2d 173, 176 (7th Cir. 1985); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986); *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987).

The reason for a different standard of review for contempt is obvious. Contempt authority is provided to the federal courts to punish by *fine* or *imprisonment* for misbehavior in the presence of the court, or disobedience, or resistance to its lawful orders. 18 U.S.C. § 401 (1988). While due process might require a hearing before a judge of the district court before such punishment could be imposed, due process requirements for the imposition of a Rule 11 sanction for filing a frivolous pleading, which is simply a violation of a Federal Rule of Civil Procedure, do not require a hearing before the district court judge. The fact that due process for a Rule 11 sanction is satisfied by less than a full and independent hearing is consistent with *Donaldson v. Clark*, 819 F.2d 1551, 1560 n.12 (11th Cir. 1987) ("Rule 11 does not require that a hearing separate from trial or other pretrial hearings be held on Rule 11 charges before sanctions can be imposed[.]")

Accordingly, it is clear from the plain language of § 636(b)(1)(A) and subsequent court decisions that federal magistrates have jurisdiction to impose Rule 11 sanctions under that section.

III

Petitioner has not Established that a Real Conflict Exists Between the Circuit or Lower Courts or that this Case is Important to the Public

This Court has noted that certiorari should not be granted unless there is a real conflict of authority between the lower courts or where the issue to be decided is only important to the parties and not the public. *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 392-393 (1923). This Court stated in *Layne* that:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Id.

Resolution of this issue is only important to the petitioner and not to the public for three major reasons: (1) there is no actual conflict in the application of law by the lower courts here; (2) there is no real conflict of opinion and authority between the Circuits; and (3) in the alternative, even if the Court resolves an alleged conflict between the Circuit Courts, it would not change the outcome of the decision below.

A. Procedural differences between: (1) the district court's review of Rule 11 determinations, and (2) recommendations by magistrates, reflect permissible exercises of district courts' discretionary power, not widespread confusion in the lower courts

Petitioner argues that this Court should resolve widespread confusion in the courts because district courts are apparently applying differing standards of review of Rule 11 sanctions ordered or recommended by a magistrate. (Pet. 14). Petitioner's argument is based on the contention that some district courts have characterized sanctions as dispositive pretrial matters and reviewed magistrates' "recommendations" of sanctions by the district court *de novo,* while other courts have characterized such sanctions as non-dispositive, with the magistrate's "written order setting forth the disposition of the matter" reviewed for clear error. However, the cases cited by the petitioner do not reflect real confusion among the courts; they illustrate only that district courts are exercising their discretionary power under the Federal Magistrate Act.

Specifically, a magistrate is permitted under 28 U.S.C. § 636(b)(1)(A) (1988) of the Act to hear and "determine" any pretrial nondispositive matters and district courts review such "determinations" under a clearly erroneous or contrary to law standard. *Ocelot Oil Corp. v. Sparrow Industries,* 847 F.2d 1458, 1461-62 (10th Cir. 1988); *see also Merrit v. International Bro. of Boilermakers,* 649 F.2d 1013, 1016-17 (5th Cir. 1981).

However, the district court is required to apply a *de novo* review of "recommendations" of dispositive matters made by the magistrate under 28 U.S.C. § 636(b)(1)(B) (1988). *Id.* at 1462. The cases cited by petitioner are cases where the district judge

reviewed "recommendations" of the magistrates *de novo* under 28 U.S.C. § 636(b)(1)(B) (1988). Thus, the trial court correctly applied the law in each case cited by the petitioner.

Further, and more importantly, a district court has discretion and is not required to refer pretrial non-dispositive matters to a magistrate under § 636(b)(1)(A). It may, at its discretion, refer a *non-dispositive* pretrial matter to a magistrate for findings and recommendation under 28 U.S.C. § 636(b)(1)(B) (1988). *Delco Wire & Cable, Inc. v. Weinberger,* 109 F.R.D. 680, 685 (E.D. Pa. 1986).[5]

For example, in *Delco Wire,* the district court disagreed with the proposition that certain non-dispositive matters must always be referred for determination under 28 U.S.C. § 636(b)(1)(A), (1988) rather than for recommendation under § 636(b)(1)(B). *Id.* The court, in interpreting the discretionary power of the trial court under the Act, stated:

> It is evident from the Act's legislative history that the purpose of the Act's referral and review provisions is to define the limits of the powers which a court may allow a magistrate to exercise, not to restrict the ultimate authority of an Article III court over a case pending before it. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9-11, *reprinted in* 1976, U.S. Code Cong. & Admin. News 6162-71; *see also Thomas v. Arn,* ____ U.S. ____, 106 S.Ct. 466, 474, 88 L.Ed.2d 435 (1985)(discussing the scope of the authority retained by a district judge under the Act).

Id.[6] This result is consistent with the decision in *Smith v. Detroit Federation of Teachers Local 231,* 829 F.2d 1370, 1372 (6th Cir.

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[5] *See also, Societa Anonima Lucchese, Etc. v. Catania S. Corp.,* 440 F. Supp. 461, 462-63 (D. Mass. 1977) (a remand motion, although a non-dispositive pretrial matter, may, at the Court's option, be referred to a magistrate for a recommendation under § 636(b)(1)(B) instead of under § 636(b)(1)(A).); 7 J. Moore, J. Lucas & K. Sinclair, Jr. *Moore's Federal Practice* ¶ 72.04[4.-9], 72.04[2.-6] (2d ed. 1990).

[6] Disagreement does exist as to whether a district court judge may be precluded from applying a less deferential standard of review under

1987), where the district court expressly referred the matter of sanctions to the magistrate for a "recommendation." Similarly, a magistrate is free to elect whether to make a recommendation rather than entering a final determination of a non-dispositive pretrial matter. *First National Bank of South Carolina v. United States,* 81-2 U.S. Tax Cas. (CCH) ¶ 13,422 at 88,772 (D.S.C. 1981); 7 J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶ 72.04[2.-6] (2d ed. 1990). This rule is consistent with the results of the remaining cases cited by the petitioner (*John, Lancellotti,* and *Kostovski*). The magistrate expressly "recommended" that sanctions be imposed. The exercise of discretion reflected in these cases at both the magistrate and district court levels illustrates the kind of flexibility and allocation of responsibility which is needed for an efficient and effective judiciary—the primary goals for implementing the Magistrate Act and Rule 11.

A Rule 11 sanction that does not dispose of a case on the merits is a pretrial non-dispositive matter. *Magnus Electronics v. Masco Corp. of Indiana,* 118 F.R.D. 443 (N.D. Ill. 1988), *aff'd in part, vacated in part,* 871 F.2d 626 (7th Cir.), *cert. denied,* 110 S. Ct. 237 (1989). Therefore, a trial judge may, at his or her discretion, refer a Rule 11 sanction issue to a magistrate for a final determination *or* for a recommendation.

Thus, petitioner misinterprets permissible differences in the procedural application of 28 U.S.C. § 636(b)(1)(A) and (B) (1988) by trial judges and magistrates as being confusion in the lower courts. If the district courts or the magistrates were confused as to what procedural approach to take, the petitioner has not shown where the confusion lies. The fact that the lower courts

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§ 636(b)(1)(A). *See, e.g., Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1113, 1120 (3d Cir. 1986), *cert. denied,* 484 U.S. 976 (1987) (the district court erred by modifying a magistrate's order under § 636(b)(1)(A) after a plenary review); *contra, United States v. Frans,* 697 F.2d 188, 191 n.3 (7th Cir. 1983), *cert. denied,* 464 U.S. 828 (1983) (allowing a district court to overturn a magistrate's decision to compel discovery and noting that a district court review is not restricted under § 636(b)(1)(A)); *Delco Wire,* 109 F.R.D. 680 n.2 (disagreeing with *Cipollone.*).

are exercising their discretionary power under the Act does not mean that there is widespread confusion in the courts.

B. There does not exist a conflict among the Circuit Courts of Appeals

The issue of whether a district court should treat a Rule 11 sanction order as a dispositive or non-dispositive matter was raised in only one of the cases that petitioner cited for the proposition that magistrates are treating sanction issues as dispositive matters. *John v. Louisiana,* 899 F.2d 1441, 1446 (5th Cir. 1990).[7] However, even in *John,* the court noted the magistrate is not expressly excluded from making a final determination of an ancillary issue under § 636(b), such as sanctions, even after the merits of a case have been decided. *Id.*

Hence, decisions cited by petitioner do not establish a split in the Circuit Courts on the issue of whether a Rule 11 sanction is characterized as dispositive or non-dispositive.

C. The cases cited by the petitioner showing that the courts have reviewed magistrates' recommendations under a *de novo* standard are factually distinguishable from the present case

Even if there is a conflict or confusion in the lower courts, the present case is so factually and legally distinguishable from the cases petitioner cites for the proposition that some courts are treating sanction issues as dispositive matters, that review by this Court would not resolve the claimed confusion. This does not represent a situation where the Court explicitly indicated that Rule 11 was a dispositive matter only to be considered under § 636(b)(1)(B).

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[7] In *Smith v. Detroit Federation of Teachers Local 231,* 829 F.2d 1370, 1373 (6th Cir. 1987), the court was faced with questions dealing with a party's failure to object to a magistrate's recommendation under § 636(b)(1)(B). In *Lancellotti v. Fay,* 909 F.2d 15, 17 (1st Cir. 1990) the court stated that "[w]e intimate no view, therefore, on whether Rule 11 sanctions ordered by a magistrate are properly characterizable as 'dispositive' or 'nondispositive' within the meaning of 28 U.S.C. § 636 and rule 72."

Two of the cases cited by petitioner involved situations where sanctions were directly *linked* to dispositive motions. For example, in *Lancellotti,* the defendants moved for dismissal and imposition of Rule 11 sanctions. The district court referred the matter to a magistrate, who later recommended that the suit be dismissed and that sanctions be imposed. 909 F.2d at 16.

Similarly, in *Kostovski v. Getty Petroleum Corp.,* No. 87 CV 1475 (E.D.N.Y. April 12, 1990), 1990 U.S. Dist. Lexis 5710, the magistrate recommended summary judgment be granted and Rule 11 sanctions be imposed against plaintiff for bringing a frivolous diversity jurisdiction argument. *Id.* Again, the Rule 11 matter was *linked* with a dispositive motion.

The present situation is clearly distinguishable from both *Lancellotti* and *Kostovski.* Here, the Rule 11 sanction was not linked to any dispositive matter such as a dismissal or a summary judgment motion. In fact petitioner's case had settled. Petitioner was sanctioned by the magistrate for making factual misrepresentations in a motion for reconsideration of plaintiff's motion to sanction the defendant under Fed. R. Civ. P. 37(d) for failure to comply with discovery. (App., *infra,* 18a).

The other cases cited by petitioner are both factually and procedurally distinguishable. In *Smith,* the prevailing defendant moved for attorney's fees based on both statutory and inherent powers of the court. 829 F.2d at 1372. What is apparent is the district court exercised its discretion by referring the matter to a magistrate for a report and a recommendation. *Id.* The magistrate recommended that the defendant was entitled to attorney's fees under 42 U.S.C. § 1988 (1988), under 28 U.S.C. § 1927 (1988), under Fed. R. Civ. P. 11, and pursuant to the court's inherent power to assess costs against a party for bad faith litigation. *Id.* The total amount of fees assessed came to $30,000 which the magistrate recommended be reduced to $15,000. *Id.* at 1373.

Similarly, in *John v. Louisiana,* 899 F.2d 1441 (5th Cir. 1990), the magistrate was not only required to determine if the district judge's pretrial order was consistent with a local rule and if the plaintiff violated the rule, the magistrate was also required to review the long procedural history of the case in order to under-

stand "why the court was hearing a sanction motion against an attorney who no longer represented his original client and whose case had twice been appealed." 899 F.2d at 1445 and 1449. Further, the magistrate recommended sanctions of over $11,000. *Id.* at 1445.

The present case is distinguished from *John* and *Smith* in that the matter dealt with is factually and procedurally less complex. Here, the petitioner was sanctioned $1,000 under Rule 11 for conduct that occurred before the magistrate. (App., *infra*, 16a). The sanctions were based on facts that were specifically within the knowledge of the magistrate. *Id.* Beyond interpreting the law underlying Rule 11 sanctions, the magistrate was not required to analyze complicated statutory law. Nor was the magistrate required to review a factual and procedural record of which he was not personally familiar.

Further, the amounts awarded in *Smith* and *John* were much higher then the $1,000 sanctioned against petitioner. (App., *infra*, 18a). "While some fee and cost sanctions are so high that the magistrate or district judge elects to treat them as recommendations for the judge's approval, most awards of this nature are deemed to be within the discretion of the magistrate, reviewable before the district judge only for an abuse of discretion on a showing of clear error." [footnote omitted] 7 J. Moore, J. Lucas & K. Sinclair, Jr. *Moore's Federal Practice* ¶ 72.04[2.-4] (2d ed. 1990).[8]

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[8] This is consistent with the cases cited by the petitioner supporting the proposition that Rule 11 sanctions may be treated as non- dispositive pretrial matters. (Pet. 14). *Magnus Electronics v. Masco Corp. of Indiana*, 117 F.R.D. at 444 (The magistrate imposed $5,300.63 in sanctions); *Moore v. Fieser*, No. 88-1134-C (D. Kan. July 14, 1989), 1989 U.S. Dist. Lexis 9080 (the magistrate imposed $300 in sanctions).

CONCLUSION

In conclusion, this Court should not grant certiorari as the petitioner has not established an important question of law. Any differences in the approach of the lower courts to the application of § 636(b) reflects a permissible use of their discretionary power. Further, the issue of whether a Rule 11 sanction is "dispositive" or "non-dispositive" has not frequently arisen. The Circuit Courts have not decided nor have they have been directly confronted with the issue.

Finally, the cases that petitioner cites as illustrating an approach opposite to the Ninth Circuit's approach are factually distinguishable. The cases cited by the petitioner establish that the district courts have exercised their discretionary power to refer an issue for recommendation to a magistrate, not because of confusion as to whether the matter was dispositive or nondispositive, but for other practical reasons, namely, the sanction motions were linked to dispositive pretrial matters or to complex procedural and factual patterns that were not within the personal knowledge of the magistrate.

This Court should deny petitioner's request for certiorari.

Respectfully submitted,

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